I do not think that any of the statutory provisions to which I have referred entitle an accused person to know by what means the prosecution proposes to prove the facts which they allege make up the offence under the particular section with which the accused is charged, assuming due compliance with sections 162, 163 and 164. Section 59 is merely a vehicle whereby secondary evidence may, if it comes to the point, be given of the contents of a document.

Although the letter and the cheque were part of the means by which the prosecution proposed to prove the facts which they alleged made up the offences of forgery it was not for that reason that I think the accused should have been supplied with photostat copies. It is because, as I have already said, without them the accused was not in a position to prepare his defence and in such circumstances justice was not being done.

In my opinion, therefore, in criminal trials before a Sessions or Magistrate's Court, apart from the provisions of sections 59 and 182(1), there is no power for the President or the Magistrate to order the prosecution to produce the documents relevant to that case, and I have not found, nor have I been referred to, any provision which gives power to order the supply of copies.

In the event the accused was acquitted without being called upon for his defence so that there will be no order on this appeal.

No order.

DIN v. PUBLIC PROSECUTOR

[A. Cr. J. (Suffian J.) December 4, 1962]

[Alor Star — Criminal Appeal No. 77 of 1962]

Road Traffic — Plying vehicle for hire or reward — "Hire or reward" — Meaning of — Road Traffic Ordinance, 1958, ss.92(1) and 144(a) — Presumption under s.144(a) — Rebuttal of.

Whether a vehicle is being used for conveying passengers for hire or reward in breach of section 92(1) of the Road Traffic Ordinance is a question of fact and must be determined upon all the circumstances of the case, including the length of time over which this course of conduct has gone on, the nature of the payments made and the exact amount of payment. The test is whether the accused intended to accept from the passengers a payment which he expected to be tendered and which they intended to tender when he had given them their ride.

Cases referred to:—

(1) *Wyatt* v. *Guildhall Insurance Co. Ltd.* [1937] 1 K.B. 653.

(2) *McCarthy* v. *British Oak Insurance Co., Ltd.* [1938] 3 All E.R. 1.

(3) *Bonham* v. *Zurich General Accident & Liability Insurance Co., Ltd.* [1945] K.B. 292.

MAGISTRATE'S CRIMINAL APPEAL.

G. N. Christie for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Suffian J.: The principal question for decision here is whether or not the accused on the 29th October, 1961 conveyed in car No. AB. 2851, the two passengers, Ismail and Omar, for hire or reward, an offence punishable under section 92(1) of the Road Traffic Ordinance, 1958.

The prosecution depended on three things —

(a) when kept under police observation from 7th October, 1961 to 16th October, 1961 the car was seen being driven by the defendant in and out of town carrying passengers of various nationalities, 12 times altogether;

(b) on 29th October, 1961, the date specified in the charge, it was again driven by the accused but this time with the two Malays on board; and

(c) section 144(a) of the Road Traffic Ordinance which says that it shall be presumed until the contrary is proved that the conveyance of Ismail and Omar was for hire or reward.

The learned Magistrate called on the accused for his defence. The accused gave evidence on oath denying the charge. He said that the car belonged to Salleh (not a witness) and he drove it at Ismail's request. He called the other passenger, Omar, in support who said that he was invited by Ismail to accompany him to Kubor Panjang. At the end of the case, the learned Magistrate convicted the accused who appealed.

Ismail, the other passenger, had been called by the prosecution. He said that the car belonged to Salleh, not the accused. On the day in question he borrowed it from Salleh and asked the accused to drive it. He bought lunch for the accused and put in $4 worth of petrol into the car. They then drove off. It is urged for the appellant that Ismail having been called by the prosecution as a witness worthy of credit and not having been impeached by them, at the end of the prosecution case the learned Magistrate should not even have called on the accused to enter into his defence as the statutory presumption had already been rebutted by Ismail's own evidence.

The only evidence of the hiring or reward here is the lunch bought by Ismail for the accused and the $4 worth of petrol put into the car by Ismail.

I allowed the appeal on 25th November, 1962 and when writing my grounds I came across three English decisions: *Wyatt* v. *Guildhall Insurance Co. Ltd.* (1); *McCarthy* v. *British Oak Insurance Co., Ltd.* (2); *Bonham* v. *Zurich General Accident & Liability Insurance Co., Ltd.* (3). Though they were decisions on the expression "hire or reward" in insurance policies, nevertheless I think that the principle decided therein affords valuable guidance in this appeal. In the second case Atkinson J. stated the principle as regards hiring thus —

"I think that what is intended to be excluded by this policy is something which is a genuine business contract for hiring, something which is a real hiring, a doing

something for a stipulated reward, a stipulated *quid pro quo*..... I think that one must look at all the circumstances."

Mere payment for "oil" and petrol by the person for whose benefit the car was used was not hiring.

In the third case Uthwatt J. said:—

"It appears to me that a distinction falls to be drawn between the word 'hire' and the word 'reward'. The first word necessarily imports, I think, an obligation to pay. The inclusion of the second word is not, in my opinion, merely for the purpose of giving an alternative word to 'hire' meaning the same thing, but for the purpose of bringing in a subject-matter which does not include hire and including (I do not say it is confined to that) cases where there is no obligation to pay. ..... Whether [the accused] was carrying for reward ..... is a question of fact determined by all the circumstances of the case, including the length of time over which this course of conduct ..... has gone on; the nature of the payments made, namely cash; the exact amount of the payment, ..."

Applying the test used by Du Parcq L.J. in the third case, I do not think that on the evidence herein the learned Magistrate could have found that the accused was —

"carrying [the] two gentlemen as passengers, and that he intended to accept from them a payment which he expected to be tendered and which they intended to tender when he had given them their ride ....."

The accused received no cash and the petrol went into the car which belonged to some one else. The facts here are similar to the facts in the second case and unlike those in the first and third cases.

For the above reasons I allowed this appeal, quashed the conviction on all the charges (there were two) and set aside the sentence, the fine if paid to be returned to the accused.

Appeal allowed.

Re SOO-HOO HEM LENG

[O.C.J. (Hepworth J.) December 6, 1962]

[Penang — Originating Summons No. 117 of 1956]

Will — Devise to adopted son — No legal adoption — Death of adopted son — No ascertainable next-of-kin.

Bona vacantia — Whether his estate accrued to Government of Federation of Malaya.

By his will made in Penang one Soo-Hoo Hong devised certain immovable properties in Penang and Perak to his adopted son, Soo-Hoo Hem Leng, who disappeared in 1942 and had never been seen since. By an order of Court in 1952 it was ordered that the death of the said Soo-Hoo Hem Leng could be sworn to have occurred on or since September 2, 1942. The applicants, as administrators, took out this originating summon to ascertain whether the said Soo-Hoo Hem Leng died leaving any ascertainable next-of-kin and if there were none whether his estate accrued to the Government of the Federation of Malaya.

Held: (1) the law applicable in 1942 in Penang was English law according to which the Crown and now as a result of constitutional changes the Government of the Federation of Malaya was entitled to the property as *bona vacantia;*

(2) the law applicable in 1942 in Perak was the Federated Malay States Distribution Enactment according to which, if the intestate left no next-of-kin, his estate passed to the Federated Malay States Government as *bona vacantia*. By virtue of section 4 of the Transfer of Powers Ordinance, 1948, and section 30 of the Land Code, the reference to the Government of the Federated Malay States should be construed as the Government of the State of Perak.

ORIGINATING SUMMONS.

Ong Huck Lim for the applicants.

Wan Sulaiman bin Pawan Teh (Federal Counsel) for the Attorney-General.

Khoo Keat Siew for persons served under orders of Court dated November 25, 1957 and March 26, 1958.

J. B. Wilkinson for person served under Order of Court dated January 27, 1958.

Person served under Order of Court dated August 9, 1958 absent.

Cur. Adv. Vult.

Hepworth J.: By his will made at Penang one Soo-Hoo Hong *inter alia* devised houses No. 82, Main Road, Bagan Serai, Perak, and Nos. 117, 118, 119, 120 and 121, Jetty Road, Bagan Serai, Perak, to his sons, Soo-Hoo Chuan Leng and Soo-Hoo Hem Leng and his grandson, Soo-Hoo Sheow Yew in fee simple as tenants-in-common in equal shares. He also devised houses No. 4, Carnarvon Street, Penang, and No. 25, Toh Koyah Road, Penang, to the said Soo-Hoo Hem Leng.

The said Soo-Hoo Hem Leng was an adopted son having been adopted in 1923, but there was no evidence of any legal adoption proceedings having taken place, at any rate so far as this country is concerned.

Early in 1942, shortly after the Japanese occupation of Hong Kong, Soo-Hoo Hem Leng was taken to China by one Wong Foong Kiew, the second wife of the said Soo-Hoo Hong. On the 2nd September, 1942, the said Soo-Hoo Hem Leng disappeared and has never been seen since.

By an order of Court dated the 2nd May, 1952, made in Penang Originating Motion No. 17 of 1952 it was ordered that upon the application for a grant of letters of administration to the estate of the said Soo-Hoo Hem Leng the death of the said Soo-Hoo Hem Leng could be sworn to have occurred on or since the 2nd September, 1942. Letters of administration to the estate of the said Soo-Hoo Hem Leng were granted to the applicants on the 24th June, 1954.

The estate of the said Soo-Hoo Hem Leng, deceased comprises the devise of the property referred to above and this property or the proceeds thereof was valued at $21,550 for estate duty purposes. In addition there are accumulated rents which have been paid into Court.

The purpose of this originating summons is to ascertain whether the said Soo-Hoo Hem Leng died with any ascertainable next-of-kin and if there were none whether his estate accrues to the Government of the Federation of Malaya as *bona vacantia*.